UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 252

Docket No. CB-7121-08-0022-V-1

Jacquen Lee,

Appellant,

v.

Department of Labor,

Agency.

December 23, 2008

Eleanor J. Lauderdale, Esquire, Washington, D.C., for the appellant.

Jamila B. Minnicks, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's request for review of the June 17, 2008 arbitrator's award issued in her case. For the reasons set forth below, we GRANT the appellant's request for review, and SUSTAIN the arbitrator's decision.

BACKGROUND

¶2 The agency removed the appellant from her Audit Resolution Specialist position under 5 U.S.C. chapter 43, based upon a charge of unacceptable performance. Request for Review File (RFRF), Tab 5, Arbitration Award (AA) at 1. The appellant pursued this action through the negotiated grievance

procedure, and following a hearing, the arbitrator denied the grievance, finding that the agency proved that it properly removed the appellant for unacceptable performance. *Id*. at 2, 36.

¶3 In her request for review, the appellant contends that the arbitrator erred in determining that the agency's actions satisfied the performance improvement procedures mandated by chapter 43 and set forth in the governing collective bargaining agreement (CBA), and maintains that the agency denied her the substantive due process to which she is entitled as a federal employee. RFRF, Tab 5 at 3-4. The appellant also contends that her removal was the result of age and race discrimination. *Id.* at 22-23.

ANALYSIS

The appellant's request for review falls within the Board's jurisdiction.

¶4 The Board has jurisdiction to review an arbitrator's decision under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 5 (2006). Each of these criteria is satisfied in this case. The Board has jurisdiction over removals for unacceptable performance under 5 U.S.C. chapter 43, and a final grievance decision has been issued. The appellant has raised a claim that the agency's action was the result of age and race discrimination,[1]

[1] We note that, although the record indicates that the appellant charged in her grievance that the agency's actions were the result of discrimination based on gender, age, and disability, RFRF, Tab 5, Subtab 12 at 2, the appellant does not appear to have raised her discrimination claims before the arbitrator. In reviewing an arbitrator's decision, however, the Board has jurisdiction to consider an issue of prohibited discrimination even if the appellant did not raise the issue before the arbitrator, *see Jones v. Department of the Navy*, 898 F.2d 133, 135 (Fed. Cir. 1990); *Butler v. Internal Revenue Service*, 86 M.S.P.R. 513, ¶ 9 (2000), *aff'd*, 73 F. App'x 730 (5th Cir. 2003), and "irrespective of whether the appellant makes a nonfrivolous allegation of discrimination," *see Bennett v. National Gallery of Art*, 79 M.S.P.R. 285, 294 (1998).

which is prohibited by 5 U.S.C. §§ 2302(b)(1)(A) and (B) and appealable to the Board in conjunction with an otherwise appealable action under 5 U.S.C. § 7702(a)(1)(B)(i) and (iv). We therefore find that this matter is within the Board's jurisdiction. *See Williams v. Government Printing Office*, 86 M.S.P.R. 583, ¶ 5 (2000).

The record does not establish that the arbitrator erred in interpreting civil service law, rule, or regulation in this case.

¶5 The standard of the Board's review of an arbitrator's award is limited. *See Fitzgerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 9 (2008). The Board will modify or set aside such an award only when the arbitrator has erred as matter of law in interpreting civil service law, rule, or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, the arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for example, by misallocating the burdens of proof or employing the wrong analytical framework. *Berry v. Department of Commerce*, 105 M.S.P.R. 596, ¶ 5 (2007).

¶6 Here, the appellant has not established that the arbitrator erred as a matter of law in interpreting civil service law, rule or regulation. The arbitrator correctly determined that, to sustain an action for unacceptable performance under chapter 43, the agency must demonstrate by substantial evidence[2] that: 1) the removal was effected under a performance appraisal system approved by the Office of Personnel Management; 2) the performance standards are valid; 3) the employee was provided with a reasonable opportunity to demonstrate acceptable performance; and 4) the employee's performance was unacceptable in

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[2] Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1). It is a lower standard of proof than preponderance of the evidence. *Id.*

at least one critical element. AA at 36; *see* 5 U.S.C. §§ 4302(b), 4303(a), 7701(c)(1)(A); *Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001).

¶7 Of these elements, the appellant's request for review only challenges the arbitrator's determination that the agency gave her a reasonable opportunity to improve her performance and that her performance was unacceptable. RFRF, Tab 5 at 4; AA at 36. The arbitrator found that the agency properly placed in effect a performance improvement plan (PIP) which afforded the appellant a period of 90 days to improve her performance to an acceptable level. AA at 36-37. He further found that the PIP period ended without the appellant having performed or submitted any work in accordance with the PIP, but that the agency agreed, at the union's request, to afford her an additional 60-day period to demonstrate improved performance. AA at 37-39. He credited the unrebutted testimony of the agency's witnesses that the agreement between the agency and the union was to hold the PIP -- the 90-day period of which had just been completed -- in abeyance, and that the union would withdraw certain grievances filed on behalf of the appellant. *Id.* at 39. Although the agency thereafter issued a memorandum dated February 3, 2004, and entitled "Official Warning Regarding Performance" which stated, in part, that "[d]uring a recent meeting with the [union], it was mutually agreed that management would withdraw the formal [PIP] and issue the work assignments outlined in the PIP in an Official Warning Memorandum," RFRF, Tab 1, Subtab 8; AA at 15, the arbitrator determined that the characterization of the status of the PIP as "withdrawn" rather than as "held in abeyance" pending the additional 60-day period constituted procedural error, AA at 41. Further, to the extent that the language used in this memorandum was not consistent with the parties' agreement to hold the PIP in abeyance, the arbitrator found that the terms of the agreement were determinative. *Id.* at 39. Thus, the arbitrator concluded that the PIP had not been withdrawn, and that the appellant was placed on notice of the disciplinary consequences of not performing her work

at an acceptable level through her performance standards and in the standards set forth in the PIP. *Id.* at 39-42. The arbitrator also found that the appellant was placed on notice by the February 3, 2004 memorandum of the work she needed to perform at a satisfactory level and of the various due dates for the submission to agency management for review of stages of that work, as well as for the final completion of that work. *Id.* at 42. The arbitrator further found that the appellant knowingly accepted the additional 60-day period, but failed once again to perform any of the work specifically assigned to her. *Id.* at 39. Based on the foregoing, the arbitrator concluded that the appellant was afforded all of her due process rights to the extent that she was afforded 150 days to improve her performance to an acceptable level with regard to assignments which she had been given almost a year before. *Id.* at 42.

¶8 The appellant contends that the arbitrator erred in sustaining her removal because "her official warning, the 90-day PIP, had been withdrawn, and the performance management system does not allow a performance based removal where no 90-day improvement plan has been instituted and brought to completion." RFRF, Tab 5 at 11. Because the agency removed the appellant after allegedly withdrawing the PIP, the appellant argues, its action contravened the performance management system mandated by Congress under chapter 43 and contained in the CBA between the appellant's union and the agency. RFRF, Tab 5 at 10-13. Here, the arbitrator rejected, based on an assessment of the testimony of the witnesses, the appellant's claim that the agency withdrew the PIP, or that she reasonably could have relied on the stated "withdrawal" of the PIP to believe that she could perform no work for the additional 60-day warning period and, yet, have no adverse action taken against her for unacceptable performance. AA at 41-42. Rather, the arbitrator found that the appellant knowingly accepted the additional 60-day period and was placed on notice that she could be removed for not performing her work at an acceptable level, but that she failed to submit any work at any time from about June 2003 through and including the processing of

her grievance. *Id.* at 39-42. These are specific findings, not in conflict with the Board's substantive law, and are therefore entitled to our deference. *See Benson v. Department of the Navy*, 65 M.S.P.R. 548, 554-55 (1994) (deferring to arbitrator's specific findings of fact).

¶9 We also find no basis to disturb the arbitrator's determination that the agency afforded the appellant due process. AA at 42. The appellant argues that the arbitrator erred in failing to find that she was entitled to the due process rights set forth in the parties' CBA, and in determining that the February 3, 2004 memorandum was sufficient to support a removal action thereunder. RFRF, Tab 5 at 13. The arbitrator, however, did not determine that the February 3, 2004 memorandum was in itself sufficient to support the appellant's removal. Rather, he determined that

> given the particular facts involved in this case, the Grievant was afforded all of her due process rights by Management to the extent that she was afforded 150 days, the combined completed PIP and Official Warning periods, to improve her performance to an acceptable level with regard to assignments which she had been given almost a year before.

AA at 42. Because we find no basis for disturbing the arbitrator's determination that the PIP was not withdrawn, we conclude that he did not err in considering it as part of his analysis of the appellant's due process claims. Moreover, as the arbitrator noted, "the PIP period ended - without the Grievant having performed/submitted any work in accordance with the PIP, such that the Agency could have commenced action to remove the Grievant after the PIP." AA at 39. To the extent that the appellant now complains that the agency's actions identified in the request for review may have departed from the procedures set forth in the CBA, we note that these actions occurred after the agency had reached an agreement with the union to hold the PIP in abeyance in order to afford the appellant an additional 60-day period to demonstrate her ability to perform at an acceptable level, and did not deprive her of the process to which

she was due. *Cf. Rothwell v. U.S. Postal Service*, 64 M.S.P.R. 473, 477 (1994) ("Any contract, including one which is unambiguous, may be modified after it is executed, however, and an agreement to modify existing obligations after formation of the contract may be shown by proof of an oral agreement."). We also note that on June 10, 2004, the agency issued to the appellant a notice of proposed removal for unacceptable performance which provided her with advance notice of the underlying reasons for her removal and an opportunity to respond to those reasons. RFRF, Tab 5, Subtab 1; AA at 22-25. Thus, the appellant received what due process requires, i.e., "oral or written notice of the charges against [her], an explanation of the employer's evidence, and an opportunity to present [her] side of the story." *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 666 (1994) (quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)); *see also Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614, ¶ 21 (2003) (notice of the charge, an explanation of the agency's evidence, a pre-decisional opportunity for the appellant to tell his side of the story before the effective date of the removal, and a post-decisional right to file a Board appeal are all that minimum due process requires), *aff'd*, 129 F. App'x 628 (Fed. Cir. 2005).

¶10 The appellant also argues that the arbitrator erred in determining that the agency's mistaken use of the term "withdraw" in the February 3, 2004 memorandum was harmless error. RFRF, Tab 5 at 16-18; AA at 41-42. We disagree. Harmful error occurs only when "[e]rror by the agency in the application of its procedures . . . is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights." 5 C.F.R. 1201.56(c)(3). The record evidence fully supports the arbitrator's determination that the appellant knowingly accepted the additional 60-day period to demonstrate acceptable performance, and that the agency's use of the term "withdrawal" could not have formed the basis for a reasonable belief that she could perform no work

during that period and suffer no adverse action for unacceptable performance. AA at 41-42. Further, there is no indication in the record that the agency's error was likely to have caused it to reach a conclusion different from the one it would have reached in the absence of the error. *See Gilmore v. U.S. Postal Service*, 103 M.S.P.R. 290, ¶ 22 (2006), *aff'd*, 262 F. App'x 276 (Fed. Cir. 2008).

¶11 We also reject the appellant's argument that the arbitrator erred in failing to find that the appellant could not be removed under chapter 43 because her last performance rating of record, which was issued before the PIP, was "fully successful." RFRF, Tab 5 at 12-13, 21-22. An agency is not estopped by a prior satisfactory appraisal from taking a performance-based action against an employee at any time during the appraisal cycle, where, as here, her performance in a critical element becomes unacceptable. RFRF, Tab 5, Subtab 11; *see Ketchum v. Department of Transportation*, 28 M.S.P.R. 268, 272 (1985); 5 C.F.R. §§ 432.104, 432.105(a)-(b).

¶12 Finally, the appellant contends that the arbitrator committed legal error in finding that the agency properly considered the relevant mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). That finding was arguably superfluous, as the Board has no authority to mitigate a removal or demotion action taken under 5 U.S.C. chapter 43 for unacceptable performance. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566-67 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). However, to the extent the arbitrator may have erred in applying *Douglas*, the error provides no basis for setting aside his decision, as it had no effect on his ultimate conclusion that the agency properly removed the appellant.

The appellant has not established her claims of discrimination in connection with the underlying action.

¶13 The appellant raises claims of age and race discrimination in her request for review. RFRF, Tab 5 at 22-23. In this regard, the appellant asserts that before the agency removed her, "two other high graded African American female

professionals . . . were compelled to retire because of racial discrimination." *Id.* at 22. Thus, the appellant contends that "there is a pattern of discrimination against older African-American females with[in the Employment and Training Administration]." *Id.* The appellant attaches to her request for review an arbitration award which she contends supports her claims, but that award does not concern allegations of race discrimination, and it rejects the grievant's age discrimination claim against the agency. *Id.* at 27-32.

¶14 The appellant has not, however, submitted direct evidence of discrimination, and she has not shown that she was similarly situated to an individual not of her protected group, and treated more harshly or disparately than the individual who was not a member of her protected group. *See Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). To the extent that the appellant may be alleging discrimination based on disparate impact, she has not identified a specific employment practice that is allegedly responsible for an observed statistical disparity, nor has she submitted statistical evidence sufficient to warrant a finding of discriminatory disparity in the agency's disciplinary practices. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991-94 (1988); *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 12 (2003); *Pigford v. Department of the Interior*, 75 M.S.P.R. 250, 256 (1997).

¶15 Accordingly, we find no basis upon which to modify or set aside the arbitrator's decision.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this request for review. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at

our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.